Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 83-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BAXTER RICE,

Petitioner,

v.

EVA REHNER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICI CURIAE SHOSHONE TRIBE OF THE WIND RIVER INDIAN RESERVATION STANDING ROCK SIOUX TRIBE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENT

1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-8131

HARRY R. SACHSE *
LLOYD BENTON MILLER
SONOSKY, CHAMBERS, SACHSE & GUIDO

Counsel for Shoshone Tribe of the Wind River Reservation, Standing Rock Sioux Tribe and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
INTRODUCTION	2
ARGUMENT:	
I. 18 U.S.C. 1161 Does Not Grant California the Power to Regulate and Tax the Privilege of an Indian to Sell Liquor Under Tribal and Federal Authority on an Indian Reservation	4
A. Without an Expressed Unequivocal Delegation of Authority from Congress, California has no Right to Tax a Reservation Indian or to Require an Indian to Purchase a License to Sell Liquor on Reservation Trust Land	4
1. Indians on reservations ordinarily have the right to govern themselves free of state interference	4
2. The United States has expressly preempted state taxation and regulation of Indian traders	5
3. The United States has expressly preempted state taxation and regulation of sales of liquor on Indian reservations	6
B. 18 U.S.C. 1161 is Not an Express Congressional Consent to State Taxation and Regulation of Sales of Liquor by Indians on Reservations	11
1. The plain meaning of Section 1161 defeats any claim that Congress intended to confer state jurisdiction over Indian reservations	12

TABLE OF CONTENTS—Continued

Page

2. The legislative history of 18 U.S.C. 1161 shows that Congress did not intend to grant states powers to tax licensed Indian liquor traders 13

3. Congress similarly never intended to grant states regulatory powers over reservation Indians 20

4. 18 U.S.C. 1161 has consistently been construed administratively as not extending state regulatory jurisdiction over reservation Indians 22

II. The Twenty-first Amendment Did Not Confer on the States Any Powers to Tax or Regulate Reservation Indian Liquor Matters 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES — Page

Board of County Commissioners v. Seber, 318 U.S. 705 (1943) 5
Bryan v. Itasca County, 426 U.S. 373 (1976) 4, 5, 10, 11, 14
California v. United States, 438 U.S. 645 (1978) .. 13
Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 4, 6, 10, 14
Collins v. Yosemite Park and Curry Co., 304 U.S. 518 (1938) 20, 25, 26
Draper v. United States, 164 U.S. 240 (1896) 23
Environmental Protection Agency v. State Water Resources Control Board, 426 U.S. 200 (1976) .. 13
Hancock v. Train, 426 U.S. 167 (1976) 13
In re Heff, 197 U.S. 488 (1905) 10
McClanahan v. State Tax Commission, 411 U.S. 164 (1973) 3, 4, 5, 6, 11, 14
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 11
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 3, 4, 5, 14
Morton v. Mancari, 417 U.S. 535 (1974) 5
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 24
Ramah Navajo School Board, Inc. v. Bureau of Revenue, No. 80-2162, —— U.S. —— (July 2, 1982) 3, 5, 6, 10
Rehner v. Rice, 678 F.2d 1340 (9th Cir. 1982) 11
Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) 5, 21
United States v. Kagama, 118 U.S. 375 (1886) 21
United States v. McBratney, 104 U.S. 621 (1881) .. 23
United States v. Nice, 241 U.S. 591 (1916) 10
United States v. State Tax Commission of Mississippi, 412 U.S. 363 (1973) 20, 25, 26
United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975) 20, 25, 26
United States v. Mazurie, 419 U.S. 544 (1975) .. 2, 5, 10, 12
Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) 4, 6, 10, 11, 12, 14

TABLE OF AUTHORITIES—Continued

Page

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 3

Washington v. Fishing Vessel Association, 443 U.S. 658 (1979) 21

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 3, 6, 10, 14

Williams v. Lee, 358 U.S. 217 (1959) 4, 5, 11

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 4

CONSTITUTION, TREATIES, EXECUTIVE ORDERS AND STATUTES

United States Constitution, Amendment XXI 2, 3, 4, 24, 25, 26

Act of March 30, 1802, ch. 13, sec. 21, 2 Stat. 139, 146 7

Act of July 9, 1832, ch. 174, sec. 4, 4 Stat. 564 7

Act of March 3, 1847, ch. 66, secs. 2-3, 9 Stat. 203-204 7

Act of March 27, 1854, ch. 26, sec. 3, 10 Stat. 269, 270 7

Act of February 13, 1862, ch. 24, 12 Stat. 338, 339 7

Act of March 15, 1864, ch. 33, 13 Stat. 29 7

Act of February 27, 1877, ch. 69, 19 Stat. 240, 244 7

Act of July 23, 1892, ch. 234, 27 Stat. 260 8

Act of January 30, 1897, ch. 109, 29 Stat. 506 8

Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1019 8

Act of August 24, 1912, ch. 388, sec. 1, 37 Stat. 518, 519 8

Act of May 18, 1916, ch. 125, sec. 1, 39 Stat. 123, 124 8

Act of March 2, 1917, ch. 146, secs. 1, 17, 39 Stat. 969, 970, 983 8

Act of May 25, 1918, ch. 86, sec. 1, 40 Stat. 561, 563 8

Act of June 30, 1919, ch. 4, sec. 1, 41 Stat. 3, 4 8

Act of June 27, 1934, ch. 846, 48 Stat. 1245 8

Act of June 15, 1938, ch. 435, 52 Stat. 696 8

Act of June 25, 1948, ch. 645, 62 Stat. 683, 757-760, 817-818, 820, 834 8

TABLE OF AUTHORITIES—Continued

	Page
Act of May 24, 1949, ch. 139, secs. 25-28, 63 Stat. 89, 94	9
Act of October 24, 1951, ch. 546, 65 Stat. 609	9
Act of October 31, 1951, ch. 655, sec. 30, 65 Stat. 710, 721-722	9
Act of August 15, 1953, ch. 502, sec. 2, 67 Stat. 586	9, 15
Act of August 15, 1953, ch. 506, 67 Stat. 590	16
Act of July 10, 1957, 71 Stat. 277	16
Assimilative Crimes Act, 18 U.S.C. 13	13
California Bus. and Prof. Code §§ 23954.5, 23320 (20)	2
Indian Major Crimes Act, 18 U.S.C. 1153	13
Pub. L. No. 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588	5, 14, 17
Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137	5
Trade and Intercourse Act of May 6, 1822, ch. 58, sec. 2, 3 Stat. 682	7
Trade and Intercourse Act of June 30, 1834, ch. 161, secs. 20, 21, 23, 4 Stat. 729, 732-733	7
18 U.S.C. 13	13
18 U.S.C. 1152	13
18 U.S.C. 1153	13
18 U.S.C. 1154(a)	9, 15, 22
18 U.S.C. 1154(b)	9, 15, 22
18 U.S.C. 1155	9
18 U.S.C. 1156	9, 15
18 U.S.C. 1157	16
18 U.S.C. 1161	*passim*
18 U.S.C. 1162	5
18 U.S.C. 3055	9
18 U.S.C. 3113	5, 9
18 U.S.C. 3488	9
18 U.S.C. 3617	9
18 U.S.C. 3618	9
18 U.S.C. 3619	9
25 U.S.C. 195	15
25 U.S.C. 251	9
25 U.S.C. 253	9

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. 261-264	5
25 U.S.C. 265	16
25 U.S.C. 266	16
28 U.S.C. 1355	9
28 U.S.C. 1360	5
LEGISLATIVE MATERIALS	
99 Cong. Rec. 9959 (1953)	15, 16
99 Cong. Rec. 10800 (1953)	16
99 Cong. Rec. 10928 (1953)	16
H.R. 1055, 83rd Cong., 1st sess. (1953)	15, 16, 18, 23
H.R. 3409, 83rd Cong., 1st Sess. (1953)	16
H.R. Rep. No. 83-775, 83rd Cong. 1st sess. (1953)	16, 17
S. 485, 83rd Cong., 1st sess. (1953)	18
S. Rep. No. 83-722, 83rd Cong., 1st sess. (1953)	18
Unpublished Hearings Before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs held March 18, May 6, and June 2, 1953	19
MISCELLANEOUS	
25 C.F.R. pt. 140 (1982)	6
25 C.F.R. pt. 141 (1982)	6
37 Fed. Reg. 1253-1254 (January 27, 1972)	2
39 Fed. Reg. 35189-35190 (September 30, 1974)	2
47 Fed. Reg. 55522-55523 (December 10, 1982)	2
Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation, 78 I.D. 39 (1971)	18, 22, 23
Cohen's Handbook of Federal Indian Law (1982 ed.)	9, 10
F. Cohen, Handbook of Federal Indian Law (1942 ed.)	9
Letter of August 7, 1953 from Assistant Secretary of the Interior to the Director, Bureau of Budget	18, 23
Letter of January 22, 1976 from Associate Solicitor, Division of Indian Affairs, to the Chief Counsel, Bureau of Alcohol, Tobacco and Firearms	23, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-401

BAXTER RICE,

Petitioner,

v.

EVA REHNER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICI CURIAE SHOSHONE TRIBE OF THE WIND RIVER INDIAN RESERVATION STANDING ROCK SIOUX TRIBE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk.

Amici Shoshone Tribe of the Wind River Indian Reservation, Standing Rock Sioux Tribe, and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, are all Indian Tribes recognized by the United States. The Shoshone Tribe (in conjunction with the Arapahoe Tribe)

and the Standing Rock Sioux Tribe permit sales of liquor on their reservations if in conformity with their liquor ordinances.[1]

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, to date have kept their Reservation "dry" and thus have never adopted an Ordinance authorizing the sale of liquor on the Reservation. Whether they may do so in the future is uncertain. Each of the *amici* share the critical concerns of the respondent that states not be allowed to interfere in tribal self-government by demanding that reservation Indians pay state taxes and submit to state regulatory control to do business on their own reservations, in the absence of a clear, intended, delegation of such power to the states by Congress or through the Constitution. Neither 18 U.S.C. 1161 nor the Twenty-first Amendment is such an expression.

INTRODUCTION

This case concerns California's attempt to compel an Indian woman, Eva Rehner—an enrolled member of the Pala Band of Mission Indians holding a federal trader's license—to pay a $6,000 license fee plus additional yearly fees in order to sell liquor from her general store situated on reservation trust land. Whether, under the state's liquor quota system, she would ever be awarded a license is uncertain. If none are available, under the state system she could be required to pay up to $60,000 to purchase a license on the open market.[2] The case does not

---

[1] 37 Fed. Reg. 1253-1254 (January 27, 1972) (Shoshone and Arapahoe Ordinance No. 26, repealing Ordinance No. 398 adopted November 3, 1953); 47 Fed. Reg. 55522-55523 (December 10, 1982) (Standing Rock Sioux Ordinance No. 63, amending Ordinance No. 63 adopted May 9, 1974 (39 Fed. Reg. 35189-35190 (September 30, 1974)) (replacing resolution published December 22, 1953 (18 Fed. Reg. 8626)). *See United States v. Mazurie*, 419 U.S. 544, 547-548 (1975).

[2] California Bus. and Prof. Code §§ 23954.5, 23320(21); Respondent's Brief in Opposition to Petition for Writ of Certiorari at 31 n.4.

involve the regulation or taxation of non-Indian retailers. Nor does it involve any violation of state public policy as to when or to whom liquor may be sold in the state.

Because the incidence of the $6,000 liquor tax falls squarely on Mrs. Rehner, this case is unlike *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) where this Court upheld a tax which fell on non-Indian purchasers of cigarettes from Indian retailers. Because the state tax is on activities of a tribal member on a reservation, it ordinarily would be precluded by *McClanahan v. State Tax Commission*, 441 U.S. 164 (1973) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). This is because states generally lack jurisdiction to regulate or tax Indians on their reservations, and additionally because of specific federal preemption of the regulation of Indian trade. *See Ramah Navajo School Board, Inc. v. Bureau of Revenue*, No. 80-2162, slip op. at 4-6, 7-10 (U.S. July 2, 1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-149 (1980).

California seeks to overcome its lack of regulatory jurisdiction and its absence of any power to tax by relying on a single clause within 18 U.S.C. 1161, a criminal statute. That clause suspends federal sanctions on liquor sales within Indian country if the sale "is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

California also argues that the Twenty-first Amendment of the Constitution authorizes it to tax Indian retailers and prohibit sales of liquor by Indians on Indian reservations when made without a California license. California apparently concedes that unless one of these two sources gives it the power it seeks to exercise it would have no right to tax or regulate this activity. As

we show within, the Court of Appeals properly concluded that neither 18 U.S.C. 1161 nor the Twenty-first Amendment gives California the taxing and regulatory authority it seeks to exercise here.

ARGUMENT

I. 18 U.S.C. 1161 DOES NOT GRANT CALIFORNIA THE POWER TO REGULATE AND TAX THE PRIVILEGE OF AN INDIAN TO SELL LIQUOR UNDER TRIBAL AND FEDERAL AUTHORITY ON AN INDIAN RESERVATION.

A. Without an Expressed Unequivocal Delegation of Authority from Congress, California has no Right to Tax a Reservation Indian or to Require an Indian to Purchase a License to Sell Liquor on Reservation Trust Land.

1. *Indians on reservations ordinarily have the right to govern themselves free of state interference.*

This Court has held time and again that states lack jurisdiction over actions of reservation Indians on their reservations absent an express grant from Congress.[3] The Court has so held in the area of federally-licensed Indian traders,[4] taxes,[5] retailer's licenses,[6] general regulatory jurisdiction,[7] and criminal and civil jurisdiction.[8]

---

[3] *Williams v. Lee*, 358 U.S. 217, 220-221 (1959).

[4] *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980).

[5] *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

[6] *Moe v. Confederated Salish and Kootenai Tribes*, 424 U.S. 463 (1976).

[7] *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[8] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The rationale has been the right of reservation Indians to govern themselves through their retained tribal sovereignty and, more recently, federal preemption. *See Ramah*, slip op. at 4-10.[9]

Public Law 280,[10] applicable in California, while granting the states considerable civil and criminal jurisdiction within Indian reservations, has consistently been held not to provide the states with taxation or regulatory authority over reservation Indians.[11]

2. *The United States has expressly preempted state taxation and regulation of Indian traders.*

In matters involving persons holding Indian trader's licenses, the lack of state jurisdiction has been particularly clear. Since 1790 [12] to the present [13] the Federal Government has comprehensively regulated reservation businesses by requiring that Indians (or non-Indians) wishing to sell, or "trade", on reservation lands secure licenses from a federal official subject to regulations promulgated by the Commissioner of Indian Affairs. These regulations, which specifically include sales of liquor, identify the terms and conditions under which Indian traders may operate on Indian reservations ranging from trader qualifications to business records to prices for ar-

---

[9] *See also Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) *citing and quoting United States v. Mazurie*, 419 U.S. 544, 554 n.11, 557 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *Board of County Commissioners v. Seber*, 318 U.S. 705, 715-716 (1943); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-476 (1976); *McClanahan v. State Tax Commission*, 411 U.S. 164, 167-173 (1973); and *Williams v. Lee*, 358 U.S. 217, 220-221 (1959).

[10] Pub. L. No. 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588, now partially codified at 18 U.S.C. 1162 and 28 U.S.C. 1360 and, as amended in 1968, 25 U.S.C. 1321, 1322 and 1324 (hereafter "Public Law 280").

[11] *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

[12] Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137.

[13] 25 U.S.C. 261-264; 18 U.S.C. 3113.

ticles sold.[14] In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965) this Court reviewed these comprehensive provisions and concluded that:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.*

380 U.S. at 690 (emphasis added). The Court accordingly unanimously invalidated Arizona's efforts to further burden a licensed Indian trader by imposing a state gross sales or gross income tax. The instant license and annual fees demanded by California—essentially a privilege of doing business tax—are indistinguishable from the tax burdens struck down in *Warren Trading Post*. Thus, unless 18 U.S.C. 1161 justifies them, these provisions cannot apply to respondent. *McClanahan v. State Tax Commission*, 411 U.S. at 170-171.[15]

3. *The United States has expressly preempted state taxation and regulation of sales of liquor on Indian reservations.*

As with Indian traders, control of liquor on Indian reservations has consistently been a matter of exclusive federal control. Thus, Congress' occupation of the field

---

[14] *See generally* 25 C.F.R. pt. 140 and 141 (1982), formerly designated 25 C.F.R. pt. 251 and 252 (1981).

[15] *See also Ramah Navajo School Board, Inc.*, slip op. at 7, 11 (following *Warren Trading Post* and holding Indian education statutes totally preemptive of state taxes falling on Indian school board constructing a reservation school); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165-166 (1980) (following *Warren Trading Post* and holding comprehensive Indian trader statutes totally preemptive of state taxes on unlicensed, nonresident traders selling on the reservation); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 152-53 (1980) (following *Warren Trading Post* and holding comprehensive Indian timber statutes totally preemptive of state motor carrier license and use fuel taxes on non-Indian timber enterprise operating on the reservation).

of Indian liquor transactions provides a separate reason for holding California's licensing requirements inapplicable to reservation Indians in the absence of an interpretation of 18 U.S.C. 1161 as an express and unequivocal delegation of such authority to the states by Congress.

Beginning in 1802, when Congress enacted the first general measure to control the introduction and sale of liquor among Indians,[16] the Federal Government has comprehensively regulated every facet of the liquor trade with Indians in the Indian country. Since that time Congress has passed some two dozen statutes, all designed to bring any liquor trade with Indians under the close supervision of the Federal Government and the federal courts.[17]

---

[16] Act of March 30, 1802, ch. 13, sec. 21, 2 Stat. 139, 146. This act authorized the President to take regulatory measures to control liquor among the Indians.

[17] *See e.g.*, Trade and Intercourse Act of May 6, 1822, ch. 58, sec. 2, 3 Stat. 682 (amending 1802 Act and prohibiting Indian traders from introducing liquor into Indian country, and authorizing search, seizure and forfeiture of seized liquor); Act of July 9, 1832, ch. 174, sec. 4, 4 Stat. 564 (generally prohibiting liquor in Indian country); Trade and Intercourse Act of June 30, 1834, ch. 161, secs. 20, 21 and 23, 4 Stat. 729, 732-733 (prohibiting liquor sales to Indians, distilleries, and introduction of liquor all into Indian country, authorizing seizure and forfeiture of goods, boats, packages and peltries, revocation of trader's licenses, destruction of liquor and distilleries in Indian country, civil penalties, and enforcement through military); Act of March 3, 1847, ch. 66, secs. 2-3, 9 Stat. 203-204 (amending sec. 20 of 1834 Act to add criminal penalties, make Indians "competent witnesses", and prohibit payment of annuities to intoxicated Indians); Act of March 27, 1854, ch. 26, sec. 3, 10 Stat. 269, 270 (excepting Indians in Indian country, or Indians prosecuted under tribal law, from federal sanctions); Act of February 13, 1862, ch. 24, 12 Stat. 338, 339 (amending sec. 20 of 1834 Act to equalize civil penalties; extending prohibitions to sales to Indian wards *outside* Indian country); Act of March 15, 1864, ch. 33, 13 Stat. 29 (amending sec. 20 of 1834 Act to equalize criminal penalties); Act of February 27, 1877, ch. 69, 19 Stat. 240,

Presently, in addition to 18 U.S.C. 1161, there are over a dozen provisions across three titles of the United States Code dealing with Indian liquor activities. These include

---

244 (correcting 1873 codification of 1862 Act at R.S. § 2139 to remove the 'Indian in Indian country defendant' exception); Act of July 23, 1892, ch. 234, 27 Stat. 260 (amending R.S. § 2139 (1878) to enlarge enumeration of prohibited liquors, granting jurisdiction to district and circuit courts, and recognizing arrest warrants issued by state magistrates); Act of January 30, 1897, ch. 109, 29 Stat. 506 (reenacting law, further enlarging enumeration of prohibited liquors, extending prohibitions outside Indian country to sales to Indian allottees (in addition to Indian wards), defining Indian country, and reducing criminal penalties); Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1019 (authorizing use of special officers to prohibit Indian reservation liquor traffic); Act of August 24, 1912, ch. 388, sec. 1, 37 Stat. 518, 519 (excepting sacramental wine from liquor prohibition, and enlarging enforcement powers of special officers); Act of May 18, 1916, ch. 125, sec. 1, 39 Stat. 123, 124 (enlarging application of 1834, 1864 and 1873 distillery prohibition and search, seizure and forfeiture provisions codified at R.S. §§ 2140-2141, and making possession *prima facie* evidence of unlawful introduction); Act of March 2, 1917, ch. 146, secs. 1 and 17, 39 Stat. 969, 970, 983 (amending R.S. § 2140 to authorize seizure and forfeiture of automobiles or other conveyances used to introduce liquor in Indian country; amending definition of Indian country for liquor control purposes to include Osage Co., Oklahoma); Act of May 25, 1918, ch. 86, sec. 1, 40 Stat. 561, 563 (making Indian country liquor possession an independent offense punishable under 1892 and 1897 Acts); Act of June 30, 1919, ch. 4, sec. 1, 41 Stat. 3, 4 (reenacting Indian country liquor possession offense and extending Nez Perce liquor prohibition an additional ten years); Act of June 27, 1934, ch. 846, 48 Stat. 1245 (removing ceded, non-trust Indian lands outside Indian reservations from the reach of special Indian laws applicable in the Indian country); Act of June 15, 1938, ch. 435, 52 Stat. 696 (amending and reenacting R.S. § 2139, as amended in 1892 and 1897, adding new penalty provisions, authorizing prosecution by information, and repealing 1897 Act); Act of June 25, 1948, ch. 645, 62 Stat. 683, 757-760, 817-818, 820, 834 (amending and codifying Indian liquor prohibitions in Title 18, United States Code, at secs. 1151, 1154-1156, 3055, 3113, 3488; enlarging "Indian country" definition to include all reservation lands, all dependent Indian communities, and all allotments; extending liquor prohibitions to Indian school sites formerly in the

provisions prohibiting dispensing of intoxicating liquor to Indians in Indian country (18 U.S.C. 1154(a), as limited by 18 U.S.C. 1161), making exception for activities authorized in writing by the Department of the Army (18 U.S.C. 1154(b)), prohibiting dispensing liquor on any Indian school site formerly within Indian country (18 U.S.C. 1155), prohibiting possession of liquor in Indian country (18 U.S.C. 1156), authorizing special officers to suppress liquor traffic among the Indians (18 U.S.C. 3055), authorizing the search, seizure, and forfeiture, through the district courts, of conveyances used to introduce liquor into the Indian country, their disposition, and the destruction of seized liquor (18 U.S.C. 3113, 3618; 28 U.S.C. 1355), authorizing the mitigation of forfeitures for innocent owners of seized vehicles or aircraft (18 U.S.C. 3617, 3619), establishing possession of liquor in Indian country as *prima facie* evidence of unlawful introduction (18 U.S.C. 3488), prohibiting the maintenance of any distillery in the Indian country and providing for its destruction (25 U.S.C. 251), and authorizing the use of wine in the Indian country for sacramental purposes (25 U.S.C. 253).

Indian country); Act of May 24, 1949, ch. 139, secs. 25-28, 63 Stat. 89, 94 (amending liquor prohibitions in Indian country so as to not extend to fee-patented lands in non-Indian communities or to rights-of-way); Act of October 24, 1951, ch. 546, 65 Stat. 609 (enacting 18 U.S.C. 3619 to authorize mitigation of forfeiture for innocent owners of seized vehicles or aircraft); Act of October 31, 1951, ch. 655, sec. 30, 65 Stat. 710, 721-722 (technical amendment to 18 U.S.C. 3113 search and seizure provisions); Act of August 15, 1953, ch. 502, sec. 2, 67 Stat. 586 (limiting all Indian country prohibition laws to Indian country only, and suspending liquor prohibitions where activity authorized by tribal ordinance certified by the Secretary of the Interior and if in conformity with the laws of the state in which the activity occurs). For a history of the Indian liquor statutes, see F. Cohen, Handbook of Federal Indian Law at 352-357 (1942 ed.); Cohen's Handbook of Federal Indian Law at 305-308, 338-339 (1982 ed.).

In *United States v. Mazurie*, 419 U.S. 544 (1975) this Court reaffirmed not only Congress' exclusive power [18] to "regulate the introduction of alcoholic beverages into Indian country" (419 U.S. at 554), but also the Indian tribes' continuing authority over their reservations including the authority to permit or prohibit such sales. 419 U.S. at 557. This history of federal control—even more than the trader statutes at issue in *Warren Trading Post* and *Central Arizona Machinery*, the timber statutes at issue in *White Mountain Apache Tribe*, and the education statutes at issue in *Ramah*—reveals an active and total occupation of the field of Indian country liquor traffic by the Federal Government.

It is in light of this total lack of jurisdiction by the states over reservation Indian affairs, and this specific and total preemption of state taxation of Indian trading and liquor activities, that the clause of 18 U.S.C. 1161 seized upon by California must be read.[19] Only a clear, express command from Congress that tribal Indian liquor activities on a reservation are to be subject to regulation and taxation by state authorities can overcome the otherwise applicable federal preemption over reservation Indians. Section 1161 of Title 18 is not such an express consent to state taxation and regulation.

---

[18] In *Mazurie* this Court referred to Congress' power over reservation liquor transactions under the Indian Commerce Clause as part and parcel of "Congress' exclusive constitutional authority to deal with Indian tribes." *Mazurie*, 419 U.S. at 554 n.11. *See also In re Heff*, 197 U.S. 488, 506 (1905) (holding that federal jurisdiction to regulate Indian liquor traffic was exclusive) *overruled on other grounds United States v. Nice*, 241 U.S. 591, 601 (1916); Felix S. Cohen's Handbook of Federal Indian Law at 354 (1982 ed.) ("The federal liquor laws applicable to Indian country apply to non-Indians and preempt state jurisdiction over the subject matter.")

[19] *Bryan*, 426 U.S. at 376 n.2, 392.

B. 18 U.S.C. 1161 is Not an Express Congressional Consent to State Taxation and Regulation of Sales of Liquor by Indians on Reservations.

State regulation of reservation Indians may only occur " 'by virtue of express authority conferred upon the State by an act of Congress.' " *McClanahan*, 411 U.S. at 170-171.[20] Section 1161 fails to meet that requirement.

Section 1161 provides that federal criminal sanctions against the introduction of liquor into Indian country are suspended as:

> to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

This court described this very act in *Warren Trading Post* not as granting jurisdiction to states but as "permitting application of state liquor law *standards* within an Indian reservation under certain conditions."[21] The Ninth Circuit, in the decision under review, agreed.[22] To interpret 18 U.S.C. 1161 as not only applying state standards—such as Sunday closings or prohibiting sales to minors—but as also authorizing state taxation and regulation goes far beyond the intent of Congress in enacting this "local option" measure solely to grant additional freedom to Indian tribes.

---

[20] *See also Bryan*, 426 U.S. at 376-377 and n.2 (no state power "in the absence of congressional consent"); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (state regulation "is not permissible absent congressional consent"); *Williams v. Lee*, 358 U.S. 217, 220-221 (1959) (Congress must "expressly grant[]" the jurisdiction to states to "regulate the affairs of Indians on a reservation" "which *Worcester v. Georgia* had denied").

[21] *Warren Trading Post*, 380 U.S. at 687 n.3 (emphasis added).

[22] *Rehner v. Rice*, 678 F.2d 1340, 1344-1345 (9th Cir. 1982).

1. *The plain meaning of Section 1161 defeats any claim that Congress intended to confer state jurisdiction over Indian reservations.*

On its face, Section 1161 is not a jurisdictional grant, no less a grant of taxation authority to the states. It is an exemption from prosecution by the United States under limited circumstances designed to provide for local tribal option on liquor matters. Under the statute, otherwise criminally-prohibited liquor activities may be exempted from the federal prohibition laws if they are undertaken (1) in conformity "with the laws of the State in which such act or transaction occurs" and (2) in conformity "with an ordinance duly adopted by the tribe *having jurisdiction* over such area of Indian country" (emphasis added).

Although Section 1161 clearly intends—and was so held in *Mazurie*—to confer civil regulatory authority upon the tribe "having *jurisdiction*" over the reservation (over and above its inherent governmental authority), notably absent is a comparable reference in the statute to state *jurisdiction*. Thus, whereas a tribe may actually exercise its "jurisdiction" to pass an ordinance allowing liquor sales, the only statutory reference to state law is that tribally-sanctioned reservation liquor activities should be "in conformity with the laws of the State in which such act or transaction occurs." No provision is made for state enforcement, withdrawing federal enforcement over tribal liquor transactions, or eliminating the extensive federal statutes and regulations covering Indian liquor transactions. If, as noted in *Warren Trading Post* and by the Ninth Circuit below, Congress meant only to permit "application of state liquor law standards within an Indian reservation" where a tribe had previously authorized liquor transactions by a secretarially-approved tribal ordinance, Section 1161's language is precisely the language which was suited to that purpose.

A comparison with the Indian Major Crimes Act, 18 U.S.C. 1153, as amended, makes this interpretation clear. The phrase "in conformity with the laws of the State in which such act or transaction occurs" is virtually identical to the clause of the Indian Major Crimes Act to the very same effect, providing that certain federal crimes committed on Indian reservations and prosecuted in federal court "shall be defined and punished *in accordance with the laws of the State in which such offense was committed* * * *."[23] The Indian Major Crimes Act has never been read to grant states *jurisdiction* in Indian country, but only to require the use of state substantive laws in federal prosecutions. To imply that Congress, by use of the same language in 18 U.S.C. 1161, intended to grant to the states taxation and regulatory powers over liquor sales, much less sales by reservation Indians, is more than this language can bear.

2. *The legislative history of 18 U.S.C. 1161 shows that Congress did not intend to grant states powers to tax licensed Indian liquor traders.*

Principles of Indian sovereignty and lack of state fiscal or governmental responsibility over reservation Indian af-

---

[23] Another example of the same legislative technique is 18 U.S.C. 13 (the Assimilative Crimes Act), making state standards of conduct—but not state criminal jurisdiction—applicable in federal enclaves including, by operation of 18 U.S.C. 1152 (the Indian Country Crimes Act), Indian reservations. Like the Indian Major Crimes Act, never has it been suggested that the Assimilative Crimes Act constituted a grant of state jurisdiction over federal enclaves. *See also Hancock v. Train*, 426 U.S. 167, 178-180, 198-199 (1976) (against an historical backdrop of no regulation by the states, the Clean Air Act's command that federal agencies "shall comply with * * * State * * * requirements" held not to require securance of state permits); *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200 (1976) (reaching the same result regarding very similar language and history under the Federal Water Pollution Control Act). *Compare California v. United States*, 438 U.S. 645 (1978) (against an historical backdrop of federal deference to state water law, Bureau of Reclamation held required to secure a state permit).

fairs—and thus the states' lack of need to tax Indians because of the limited services provided by states to Indians—have long led this Court to strike down state attempts to tax reservation Indians. *See, e.g., Moe*, 425 U.S. at 476-477; *McClanahan*, 411 U.S. at 173 and n.12. If California prevails here, a federally- and tribally-authorized Indian liquor seller would have to pay $6,000 outright, plus additional yearly fees in order to obtain and retain a state license.[24] These features amount to nothing less than a direct tax on reservation Indians exacted for the privilege of selling liquor on the Reservation. Since Congress had "left the state[s] with no duties or responsibilities respecting the reservation Indians," *Warren Trading Post*, 380 U.S. at 691, it hardly makes sense to argue that Congress in 18 U.S.C. 1161 granted the states the privilege of levying tax measures on reservation Indians.[25]

To be sure, California, because of Public Law 280, does have some responsibilities within Indian reservations. But 18 U.S.C. 1161 is not applicable solely within Public Law 280 states. That Congress did not intend to subject reservation Indians to state taxation is especially compelling for *amici* Tribes as their surrounding states do not exercise any Public Law 280 criminal or civil jurisdiction whatsoever over reservation Indians. Even in Public Law 280 states like California, this Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976) laid to rest any possible argument that, through that statute, Congress had implicitly granted states taxing jurisdiction over reservation Indians.

---

[24] See note 2, *supra*.

[25] *See, e.g., White Mountain Apache Tribe*, 448 U.S. at 150, 152 ("this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall"); *Central Machinery*, 448 U.S. at 163-164; *Ramah Navajo School Board*, slip op. at 11 ("the state does not seek to assess its tax in return for the governmental functions it provides to those [Indians] who must bear the burden of paying this tax").

Nowhere in the legislative history of 18 U.S.C. 1161 is there even a suggestion that Congress intended to confer on the states taxing power over reservation Indians. From its inception to its enactment H.R. 1055, the bill which ultimately became 18 U.S.C. 1161, was intended solely as a means of *benefitting* Indians who had served in the armed forces in World War II and who had returned to face discriminatory Indian prohibition laws. It was designed to benefit the Indians by removing these impediments and giving local control to the tribes.[26] The reference to state law came late in the legislative history of the bill and without any indication that Congress intended anything more than to accommodate state prohibition or closing laws. The bill's history, including archival research, is simply devoid of any evidence of a dual or secondary intent to depart from historic principles of Indian sovereignty and subject reservation Indians to state taxing jurisdiction and regulatory authority.

As originally introduced, H.R. 1055 was limited to Arizona and provided for conditionally suspending several federal laws which forbade the sale, purchase or possession by Indians of various items, including liquor, which could generally be sold, purchased or possessed by non-Indians either within or outside Indian country. Section 2 of the bill would have suspended these laws as to any act *outside* an Indian reservation if "in conformity with the laws of Arizona". Section 3 of the bill would have suspended these laws as to any act *within* an Indian reservation if "in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation." [27]

---

[26] The intended benefit to Indian tribes was to be accomplished by eliminating "certain discriminatory legislation against Indians in the United States". Title to the Act of August 15, 1953, ch. 502, 67 Stat. 586.

[27] *See* H.R. 1055, reprinted in 99 Cong. Rec. 9959 (1953). Aside from 18 U.S.C. 1154 and 1156, the original bill also provided for

Ultimately, H.R. 1055 was reported out of the House Committee on Interior and Insular Affairs to read virtually in its present form.[28] In so doing the bill was extended to all states, narrowed to deal only with the Indian liquor laws, and amended so as to cover all applicable federal Indian liquor laws.[29] Former sections 2 and 3, however, were combined into section 2 (now 18 U.S.C. 1161). The 'conformity with state law' language was thus added to former section 3's suspension of criminal penalties for sales *within* an Indian reservation made in conformity with an ordinance of the tribe "having jurisdiction over the said reservation."

The House report is brief and fails to explain what the Committee members had in mind in adding the new requirement that on-reservation liquor transactions conform to state law.[30] The report simply restates the Committee's desire "that all legislation discriminating against

---

suspending 18 U.S.C. 1157 (prohibiting sale to anyone of Indian livestock purchased for or issued by the Government), and 25 U.S.C. 195 (prohibiting sale to non-tribal members of Indian cattle purchased by the Government), 265 (prohibiting sale or pledge of hunting articles, husbandry implements, cooking utensils and clothing in Indian country) and 266 (prohibiting sale of arms in country occupied by hostile or uncivilized Indians).

[28] The Committee amendment as reprinted and adopted by the House appears at 99 Cong. Rec. 9959 (1953). A minor technical amendment made by the Senate led to the Act in its final form. *See* 99 Cong. Rec. 10800 (correcting the citation in Section 1 of H.R. 1055 as passed by the House) and 10928 (House concurring in same) (1953).

[29] The four other statutes originally carried in H.R. 1055 were carved out and dealt with in another bill, H.R. 3409. Three of these statutes, 25 U.S.C. 265, 266 and 195, were repealed outright in 1953. Act of August 15, 1953, ch. 506, secs. 1 and 2(b), 67 Stat. 590. The fourth, 18 U.S.C. 1157, was amended in 1953 but repealed four years later. Act of August 15, 1953, ch. 506, sec. 2(a), 67 Stat. 590; Act of July 10, 1957, 71 Stat. 277.

[30] H.R. Rep. No. 83-775, 83rd Cong. 1st sess. (1953) (Ser. 11666).

our Indian citizens may be abolished." H.R. Rep. No. 83-775 at 2.

Thus, no indication is given that the House Committee, well aware that reservation Indians were *not* subject to the jurisdiction of their surrounding states absent congressional provision otherwise,[31] intended by the inclusion of the 'state law' provision that reservation Indians should now be subject to state tax and regulatory jurisdiction. From what can be gleaned from the three-page report, the Committee included the phrase without consideration, on the recommendation of the Assistant Secretary of the Interior that the liquor laws should be inapplicable in Indian country "but only if such transactions are in conformity with the ordinances of the tribes concerned and are *not contrary to State law*." H.R. Rep. No. 83-775 at 3 (emphasis added). One can surmise that the Secretary did not want to create "wet" jurisdictions within "dry" states—such as Oklahoma then was—or have liquor sold on Sunday on reservations in states prohibiting such sales, but nothing explicit is said. Plainly, however, neither the Committee nor the Interior Department suggested that Indians, in addition to conforming their liquor-related conduct on an Indian reservation to state law, should also be required to pay state taxes and submit to the entire state regulatory licensing machinery over and above the secretarially-approved tribal machinery. It is clear from another letter of the Assistant Secretary—to the Bureau of the Budget recommending that the President sign the bill—that his understanding of the "state law" provision was to *preserve* "the principle

---

[31] This same Congress and Committee considered and enacted Public Law 280, highly detailed and explicit legislation setting forth the procedures under which states might acquire certain criminal and civil jurisdiction over Indian reservations and their Indian residents.

of tribal self-government", albeit to be exercised "in a manner consistent with the public policy of the state." [32]

What has been said of the House evolution of Section 1161 is equally true for the Senate in which an identical companion bill, S. 485, had been introduced. *See* Sen. Rep. No. 83-722, 83rd Cong., 1st Sess. (1953) (Ser. 11661).[33] Thus, while the inclusion of the state law provision would insure against there being "wet" havens in

---

[32] Letter of August 7, 1953 from Assistant Secretary of the Interior to the Director, Bureau of Budget, recommending passage of H.R. 1055. Portions of the letter are reproduced in *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39, 41-42 (1971). *See* discussion, *infra* at 22-24.

[33] The Senate Committee report appears to misconstrue the bill to mean that the federal prohibitions on sales to Indians anywhere, *as well as* on the introduction and possession of intoxicants in the Indian country, were *both* to be suspended only with tribal approval:

> H.R. 1055, as amended, would repeal Federal statutes relating to sales of intoxicants to Indians and the introduction and possession of intoxicants in Indian country, providing such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with ordinances duly adopted by tribes having jurisdiction over such area of Indian country.

S. Rep. No. 83-722 at 1. In fact, as presented to the Senate and as finally enacted, H.R. 1055 unconditionally did away with federal statutes prohibiting sales to Indians outside the Indian country. Moreover, and with this error in mind, the Committee report also observes that the option given to a tribe or a state was to *prohibit*—rather than to allow—liquor sales to Indians, or the introduction and possession of liquor into Indian country:

> In other words, if the bill is enacted, a State or local municipality or Indian tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales of intoxicants to Indians, they may do so.

Id. Even with these misunderstandings, it is significant that the Senate Committee made no note of what, if the state is correct, would otherwise have certainly been an historic change in the status of reservation Indians vis-a-vis their surrounding states.

Indian country within surrounding "dry" communities, the overriding scheme of the bill remained unchanged.

The absence of any reference whatsoever in the House or Senate committee hearings[34] or reports, to state jurisdiction to tax reservation Indians, together with the Secretary's letter as the source of the "state law" provision, is strong evidence that Congress did not intend the addition of the "state law" phrase to have the far-reaching consequences now urged by California.[35]

---

[34] The House hearings, far from being as clear as California would wish them to be, fail to anywhere raise the spectre of unprecedented state taxing jurisdiction over reservation Indians. Indeed, the suggestion throughout is that regulatory matters are to be left to the Indian tribes themselves and a terrible and unjustified federal burden on reservation Indians lifted. *See* Unpublished Hearings Before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs held March 18, May 6, and June 2, 1953 (hereafter "House Hearings"), reproduced in Volume II of Petitioner's Brief on the Merits. In fact, the redraft of the bill offered by the Interior Department through Commissioner of Indian Affairs Myer—which apparently formed the basis for the Committee amendments—expressly recognized that conformity to state law was being required in areas where "the state lacks full criminal jurisdiction" (Pet. Br. A-18 - A-19), adding that, if amended, Section 2 would "provide for tribal ordinances in case they do not want liquor on the reservation areas, *where the state laws do not apply.*" *Id.* at A-21 (emphasis added). *See also* Pet. Br. A-26 (remarks of Commissioner Myer) ("We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided"); A-27 (remarks of Commissioner Myer) (the bill would "provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law"—meaning not already prohibited in a "dry" state); A-68 - A-69 (remarks of Rep. Patten) (suggesting that prohibiting sales of liquor on school grounds as the type of substantive state law meant to be complied with).

[35] Whether the state system employs taxes, as in California, or state regulated monopoly sales, as in Montana and Washington, the objective is the same: to raise revenues for the state treasury. Like a tax, a monopoly system includes a "markup [which] can only be understood as an 'enforced contribution to provide for the

3. *Congress similarly never intended to grant states regulatory powers over reservation Indians.*

State policies on regulating liquor sales statewide are irrelevant—even detrimental—to the concerns of reservation Indians. For instance, in exercising their authority to regulate reservation liquor sales, a tribe may well determine that the reservation residents' welfare will be best served if only localized grocery store outlets, rather than a single central outlet, sell liquor. Such a scheme of local sales might be viewed as reducing the hazards of liquor-related highway injuries and deaths by minimizing the distance residents must travel to make their purchases on large, very rural reservations. If Congress intended that tribes hold control over the decisions to have or not have reservation liquor merchants, it must have intended that tribes also have the means of controlling those sales, including their location, number, etc.

It is the Indian tribes themselves who are most clearly concerned with the needs of their reservation people. State governments or regulatory bodies have little expertise on what is best for the reservation community. And yet, Indian tribal governmental decisions on what is best for the reservation community could be vetoed by state regulatory bodies if California's construction of Section 1161 is ac-

---

support of government', the standard definition of a tax." *United States v. Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975) (adding "We see no difference between this markup and a sales tax * * *". 421 U.S. at 608). Monopoly liquor sale states have but a more effective way than outright taxes of reaching an identical objective by setting liquor sales at artificially high prices. Indeed, the fact that Mississippi employed a monopoly form of regulation as compared to California's tax and license scheme did not alter this Court's analysis or conclusion in ruling that federal enclaves could not be forced by a state to conduct liquor sales through the state's regulatory scheme. *Id. See also United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973); *Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518, 538 (1938) (discussed *infra* at 24-26.)

cepted. Indeed, under the guise of regulation the state could deny licenses and thus prohibit all sales within Indian reservations in order to keep sales in the politically more powerful non-Indian communities. What was said in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) about state housing construction standards is no less applicable in the liquor context:

> [S]ubjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community.

532 F.2d at 664.

The legislative history of Section 1161 discussed above fails at any point to show that Congress wished states to control reservation Indian liquor sellers despite these consequences—consequences which, after all, lie at the root of why Congress has historically protected reservation Indians from surrounding communities and relieved the states of responsibilities over their affairs. Again, had Congress intended such a landmark change in the status of the Nation's reservation Indians, debates on the relative merits of such a course would be expected. In the absence of such discussion, an ambiguous provision inserted without Committee explanation should not be casually read to abolish historic Indian immunities against regulation by the very states who, after all, in many instances have been "often their deadliest enemies."[36]

---

[36] *United States v. Kagama*, 118 U.S. 375, 384 (1886). *See also Washington v. Fishing Vessel Association*, 443 U.S. 658, 696 n.36 (1979).

4. 18 U.S.C. 1161 has consistently been construed administratively as not extending state regulatory jurisdiction over reservation Indians.

The interpretation provided Section 1161 by the Ninth Circuit is consistent with the opinion eleven years earlier of the chief legal officer of the Department of the Interior—the Department charged with administering the Federal Government's responsibilities on the Indian reservations. In a published opinion in 1971, the Solicitor ruled that Section 1161 did not require the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana to secure a license from the Montana Liquor Control Board once it had complied with a duly adopted, certified and published tribal ordinance. *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39 (1971). In that case, Montana's use of a license quota system, like California's present system, precluded the award of any license to the Montana Tribe by the Liquor Control Board. The Solicitor concluded:

> We do not believe Congress, in enacting this law [18 U.S.C. 1161], intended to make state liquor laws applicable to the tribe or tribal members on a reservation when a tribe wished to terminate Federal prohibition. If Congress had intended to impose state law here with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U.S.C. sec. 1161, which it did not do. Rather, *we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.*

78 I.D. at 40 (emphasis added). The Solicitor went on to explain that in this way violations of state standards by an Indian on the Reservation would be subject to prosecution in the *federal* courts under 18 U.S.C. 1154,[37] but that

---

[37] The tribal courts, too, would be available to prosecute Indian offenders who violated tribal law. Conversely, if a non-Indian

tribal members need not also secure state licenses and thus submit to the regulatory jurisdiction of the state: "If the State of Montana insists that a subordinate tribal entity or tribal member obtain a state license, this would be an unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them." 78 I.D. at 41.

In reaching his conclusion, the Solicitor, among other things, relied upon the August 7, 1953 letter from the Assistant Secretary of the Interior to the Director, Bureau of Budget, recommending passage of H.R. 1055, as amended to its present form.[38] In describing the bill and an Indian tribe's options under it, the Assistant Secretary observed that "the bill recognizes the principle of tribal self-government, but requires that it be exercised in a manner consistent with the public policy of the state." 78 I.D. at 42. As the Solicitor correctly concluded, this balance—the principle of maintaining tribal self-government while supporting the state's public policy—would be ill-served by requiring a tribe or its members to obtain a state license. *Id.* Indeed, the entire principle of tribal self-government would be undermined by such an imposition.[39]

---

violated state standards on the Reservation, he would be subject to both state and federal prosecution. 78 I.D. at 41 (*citing United States v. McBratney*, 104 U.S. 621 (1881) and *Draper v. United States*, 164 U.S. 240 1896).)

[38] *See* pp. 17-18, *supra*.

[39] *See also*, Letter of January 22, 1976 from the Associate Solicitor, Division of Indian Affairs, to the Chief Counsel, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, holding a member of the Coeur d'Alene Indian Tribe entitled to a federal wholesaler's permit on the Coeur d'Alene Reservation despite Idaho's state monopoly on wholesaling. The Associate Solicitor reasoned:

> The rationale of the 1971 [Solicitor's] opinion was that 18 U.S.C. § 1161 intended to vest in the tribes the right to determine, in their exercise of self-government, what transac-

This interpretation of Section 1161 by the United States' chief legal officer for administration of Indian affairs is certainly entitled to "great respect". *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 (1976). This is particularly so where it also reflects the views of the Interior Department expressed both to Congress and to the Bureau of the Budget at the time Section 1161 was under consideration. This consistent interpretation by the Department of the Interior—not only responsible for administering the Federal Government's responsibility towards its Indian wards, but responsible for the very words of the statute now under consideration—should be conclusive.

In short, the Interior Department suggested an amendment which balanced tribal self-government with important state public policies. Congress accepted the suggestion without comment and made it law. California should not be allowed to come before this Court 30 years later to upset this balance and suggest a different motivation never evidenced anywhere.

II. THE TWENTY-FIRST AMENDMENT DID NOT CONFER ON THE STATES ANY POWERS TO TAX OR REGULATE RESERVATION INDIAN LIQUOR MATTERS.

To bolster its position California seeks to rely upon the Twenty-first Amendment as a grant of state power in

---

tions involving liquor were to be allowed on their reservations and to require those transactions to conform to state standards. State licensing laws, under which tribes and tribal members could be prevented from obtaining licenses, would clearly undermine such tribal governmental authority, were they determined to be applicable on reservations.

* * * *

The right of the tribe to determine what liquor transactions are to be allowed on its reservation would be meaningless if a state could thwart the tribe's determination through its prohibition of private liquor sales. (Emphasis added)

A copy of the letter is appended to this brief at 1a-2a.

Indian country. But in so doing the state plainly disregards this Court's holdings on the inapplicability of the Amendment as a source of state power in areas of federal jurisdiction.

The Twenty-first Amendment merely states that the importation of liquor into a state is prohibited if in violation of state law. Significantly, it does not grant the state any jurisdiction to reach into areas where its jurisdictional powers do not otherwise extend. Thus, this Court concluded in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938):

> The lower court was of the opinion that though the Amendment may have increased "the state's power to deal with the problem . . ., it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the Twenty-first Amendment * * *. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the Twenty-first Amendment is not applicable.

304 U.S. at 538. Indeed, in *Collins*, despite an express agreement with the United States that California reserved its taxing power, this Court declined to read the reservation of jurisdiction broadly so as to also reach regulatory measures such as are embodied in state license fees. *Id.* at 532-533.

In *United States v. State Tax Commission of Mississippi*, 412 U.S. 363, 373-377 (1973), this Court struck down Mississippi's attempt to regulate liquor sales within military bases over which the United States exercised exclusive jurisdiction. After remand, the Court also struck down Mississippi's attempt to regulate liquor sales on military bases over which the United States only exercised concurrent jurisdiction with the state. *United States v. Tax Commission of Mississippi*, 421 U.S. 599, 613-614

(1975). The Court so ruled despite the fact that, unlike California, Mississippi otherwise had a monopoly on the sale of liquor within its borders, despite the fact that on the "exclusive" federal bases the state had, by agreement with the United States, the right to serve state civil and criminal process, and despite the fact that on the concurrent bases the state and federal government both had jurisdiction.[40] Even though the state's monopoly on liquor sales was effectively defeated as to sales made on the bases, this Court firmly rejected the notion that through use of a monopoly 'tax' scheme the state could overcome federal immunities from state taxes, regulation, and control.

Here, as in *Collins* and the *Mississippi* cases, the state has no jurisdiction over activities of Indians on their reservation except as expressly delegated by Congress. The Twenty-first Amendment cannot be used as a bootstrap for state jurisdiction where it does not otherwise exist, but only as a protection of existing jurisdiction. The *Mississippi* tax cases and *Collins* negative any implication that the Twenty-first Amendment permits a state to regulate Indian liquor sales on reservations whether by licenses, license fees, taxes, monopoly sales or otherwise.

---

[40] In the second *Mississippi* case this Court held that " 'Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion' that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction." 421 U.S. at 613-614.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

HARRY R. SACHSE *
LLOYD BENTON MILLER
SONOSKY, CHAMBERS, SACHSE
& GUIDO

Counsel for Shoshone Tribe of the Wind River Reservation, Standing Rock Sioux Tribe and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation

* *Counsel of Record*

APPENDIX

[SEAL] In Reply Refer To:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Jan. 22, 1976

Mr. Marvin J. Dessler
Chief Counsel
Bureau of Alcohol, Tobacco & Firearms
Department of the Treasury
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20226

Attention: Jack Paterson, Acting Assistant Chief Counsel (Technical)

Dear Mr. Dessler:

You have requested the opinion of this office as to whether 18 U.S.C. § 1161 prohibits the issuance of a basic (wholesaler's) permit by your bureau to Noel Campbell, a member of the Coeur d'Alene Indian Tribe, who proposes to operate a wholesale liquor business on the Coeur d'Alene Reservation in Idaho.

Mr. Campbell has been issued a tribal license to operate a wholesale liquor outlet pursuant to the provisions of the tribal tobacco and liquor ordinance.

Idaho law provides that liquor may be imported and sold only through state stores and distributors. 23 Idaho Code § 101 *et seq.* Therefore, except for beer, for which wholesale and retail licenses may be issued, private individuals are prohibited from wholesaling liquor in the State of Idaho. Licenses may be issued for the sale of distilled spirits by the drink only. 23 Idaho Code § 901.

Prior to 1953, federal law prohibited the sale of liquor in Indian country. The Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. § 1161, made the federal Indian liquor laws inapplicable to:

> ". . . any act or transaction within any area of Indian country *provided such act or transcation is in conformity both with the laws of the State in which such act or transcation occurs* and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." (Emphasis added.)

The question presented then is whether § 1161 makes the laws of Idaho operational on the Coeur d'Alene Reservation in such a way as to prohibit wholesaling of alcoholic beverages by tribal members.

On February 3, 1971, the Solicitor of this Department issued an opinion holding that § 1161 does not make state liquor laws applicable to Indians on Indian reservations, but, rather, requires that state liquor laws be used as the standard of measurement to define what conduct is lawful and unlawful under federal law. The opinion further held that a tribe or tribal member with a tribal liquor license need not obtain a state liquor license. A copy of this opinion is attached. As a matter of interest, the Justice Department, responding to our request for comments on the Solicitor's Opinion, has recently informed us that it does not intend to prosecute Indians who sell liquor in conformity with state laws and tribal regulations but without a state liquor license in the State of Montana. (The opinion dealt with a situation which arose in Montana.)

The rationale of the 1971 opinion was that 18 U.S.C. § 1161 intended to vest in the tribes the right to determine, in their exercise of self-government, what transactions involving liquor were to be allowed on their reservations and to require those transactions to conform to state

standards. State licensing laws, under which tribes and tribal members could be prevented from obtaining licenses, would clearly undermine such tribal governmental authority, were they determined to be applicable on reservations. The opinion stated that "the tribe, in the exercise of its inherent powers of sovereignty, can license a . . . tribal member to operate a liquor establishment on the reservation." *Cf. United States* v. *Mazurie*, 419 U.S. 544 (1975).

Your Regional Counsel does not disagree with the Solicitor's Opinion insofar as it holds that a tribe or tribal member need not obtain a state liquor license, but he evidently takes the position that where state law prohibits the private sale of liquor entirely, Indians on reservations within the state are also prohibited from making such sales.

It is our view, however, that the rationale of the 1971 opinion applies to this situation for the same reasons that it applies to the license situation. The right of the tribe to determine what liquor transactions are to be allowed on its reservation would be meaningless if a state could thwart the tribe's determination through its prohibition of private liquor sales. We can perceive no distinction between this situation and the one dealt with in the 1971 Solicitor's Opinion. In each instance the state has defined a class of persons who may operate liquor establishments, and that definition has operated to exclude Indians authorized to operate such establishments under tribal law. It seems to us to be immaterial that in the one instance the class defined by the state comprises a small group of private individuals licensed by the state while in the other it comprises only certain persons acting as agents of the state (and includes no private individuals whatever). The principle is the same: although the state's substantive standards governing liquor sales are applicable, the tribe—and not the state—has the sovereign authority to determine the class of persons eli-

gible to make such sales, and against whom those standards will apply.

Therefore, it is our view, consistent with the 1971 Solicitor's Opinion, that the Idaho law prohibiting private liquor wholesaling does not apply to members of the Coeur d'Alene Tribe on the reservation and that Noel Campbell may, under the authority of the tribal license issued to him, operate a wholesale liquor outlet on the Coeur d'Alene Reservation.

Sincerely,

/s/ Reid Peyton Chambers
REID PEYTON CHAMBERS
Associate Solicitor
Division of Indian Affairs

Enclosure